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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

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No. 468
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DEBS MEMORIAL RADIO FUND INC. AND HENRY
GREENFIELD,

Petitioners,

vs.

ASSOCIATED MUSIC PUBLISHERS, INC.

—
PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT AND BRIEF IN SUP-
PORT THEREOF.
—

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Petitioners,

ASSOCIATED MUSIC PUBLISHERS, INC.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT.**

*To the Honorable Chief Justice and Associate Justices of
the Supreme Court of the United States:*

Your petitioners respectfully show:

Summary Statement of the Matter Involved

In this action a summary judgment was entered in the United States District Court for the Southern District of New York against petitioners for infringement of copyright of a non-dramatic musical composition by the broadcast performance thereof over Radio Station WEVD located in New York City and owned and operated by petitioner Debs

Memorial Radio Fund, Inc. (hereinafter referred to as "Debs") (Fol. 167). Debs is a non-profit corporation engaged in philanthropic and educational pursuits (Fols. 186-205, 360, 362, C. C. A. opinion, R. 135-6).

Prior to 1931 Debs was subsidized by donations solicited from the public at large (Fol. 360, C. C. A. opinion, R. 135). Its operations were thereafter financed by advances and donations from the Forward Association, a membership corporation engaged in purely educational and cultural activities throughout the United States (Fols. 207-58, 359, C. C. A. opinion, R. 135). The stock of Debs is held by nominees of the Forward Association (Fols. 178, 369, C. C. A. opinion, R. 134-5). Such advances and donations were required to make up the large deficits which Debs sustained from the operation of Station WEVD which has at all times been its sole activity (Fols. 360-1, C. C. A. opinion, R. 135). To further its philanthropic and educational objects and to reduce its operating deficit, Debs found it necessary to make available to advertisers a limited use of its broadcasting time and facilities in order to derive some revenue and thus relieve its supporters of a part of the financial burden involved in its operations (Fol. 195). As was stated by the Circuit Court of Appeals for the Second Circuit, through Judge A. N. Hand:

"Whatever may be the charter powers of Debs, we may assume that its ultimate objects, as it has been actually conducted, have been philanthropic and educational. In carrying out its purposes it has sought immediate commercial profit, even though the reason for doing this has been to forward its philanthropic program, and to obtain funds to achieve its objects it has given broadcasting time to advertisers." (R. 136)

No salaries or other compensation, directly or indirectly were ever paid to any of the officers, stockholders or di-

rectors of Debs and no dividends were ever declared or paid (Fols. 180, 334, 340, 361, C. C. A. opinion, R. 136).

Petitioner Henry Greenfield was employed as manager of Station WEVD and was held liable as a co-infringer.

The broadcast of a part of plaintiff's copyrighted work which is the subject of this action was performed by Debs on its regular musical program known as the "Symphonic Hour" (Fols. 170, 269) and was not a program sponsored or paid for by advertisers but was a so-called "sustaining" program furnished as a service to its listeners (C. C. A. opinion, R. 137). Debs derived no income whatsoever from this broadcast upon which a part of plaintiff's composition was performed (Fols. 267-8). Nevertheless, petitioners were found to have infringed plaintiff's copyright and summary judgment was entered against them in the United States District Court for the Southern District of New York on October 16th, 1942. Petitioners appealed to the United States Circuit Court of Appeals for the Second Circuit, which affirmed this judgment by its mandate of June 15th, 1944.

Jurisdiction

This case arises under the United States Copyright Act and involves an important question of Federal law which has not been, but should be, settled by this Court (Supreme Court Rule 38 (5) (b)). The novel question involved herein is the interpretation of Section 1(e) of the Copyright Act of 1909, 35 Stat. 1075, insofar as it applies to non-profit, philanthropic and educational institutions. Section 1(e) provides:

"Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right * * * (e). To perform the copyrighted work publicly for profit if it be a musical composition and for the purpose of public performance for profit."

Petitioners' liability can only be predicated upon the establishment of an express condition that the broadcast of plaintiff's musical work was "for profit". *Buck, et al. v. Jewell-La Salle Realty Co.*, 283 U. S. 191, 196 (1931). The word "for" in the phrase "for profit" indicates that the emphasis is on the "purpose" rather than the particular means whereby the purpose is achieved. *Herbert v. Shanley*, 242 U. S. 591 (1917). In order to find infringement it is necessary that "the purpose of the performance be for profit and not eleemosynary; it is against a commercial as distinguished from a purely philanthropic, public use of another's composition, that the statute is directed." *Jerome H. Remick & Co. v. American Automobile Accessories Co.*, 5 F. (2d) 411, 412.

In the instant case, it has been held that although Debs has operated Station WEVD as a philanthropic and educational service, the mere fact that a portion of its broadcasting time was utilized by advertisers resulting in revenue to Debs was sufficient to support a judgment for copyright infringement for the broadcast of plaintiff's musical work on a sustaining program from which no revenue was derived. The District Court imposed liability upon the theory that the broadcast of plaintiff's music was "for profit" because the sustaining program, though bringing in no direct revenue, helped to "build up listener appeal and in that way provide an inducement to advertisers" (Fol. 366, C. C. A. opinion, R. 137). In affirming, the Circuit Court of Appeals, through Judge A. N. Hand, stated (C. C. A. opinion, R. 138):

"The fees for advertising are obtained in order to aid the broadcasting station to pay its expenses and repay the advances to it by the Forward Association. The 'sustaining' programs are similarly broadcast in order to maintain and further build up the listening audience and thus furnish the field from which the

paying advertisers may reap a profit. It can make no difference that the ultimate purposes of the corporate defendant were charitable or educational."

Petitioners contend that the courts below failed to make the distinction required by the decisions of this Court and by the facts in this case that the music must be performed in connection with *a business which is operated for profit* in order to be deemed an infringement. Every decision involving liability for copyright infringement of a non-dramatic musical work is rooted in the finding of fact that a defendant made a public performance of a copyrighted work *for profit*—in connection with a business which was operated for profit. In most of these cases, specific attention is called to the fact that the performances were not eleemosynary and in all decisions the profit motive is emphasized as a necessary element of an action for infringement.

In this case of first impression, the Circuit Court of Appeals expressly held that "it can make no difference that the ultimate purposes of the corporate defendant were charitable or educational" (R. 138). The basic fallacy in the reasoning of the Circuit Court improperly deprives petitioners of the express benefits under the Copyright Act which sanctions non-profit public performances of copyrighted works. The decision of the Circuit Court conflicts with the decisions of this Court and enlarges the statutory rights of the plaintiff beyond the intentions of Congress by permitting recovery of damages for non-profit performances, whereas the statutory right of plaintiff is expressly limited to protection against performance of its work for profit.

This Court is earnestly solicited to pass upon the important question herein raised because it materially affects all philanthropic, educational, eleemosynary and other non-profit organizations and because a fundamental principle

is involved herein which transcends the scope of this record. The mandate of the Circuit Court of Appeals was entered on the 15th day of June, 1944.

Questions Presented

1. Does the doctrine of *Herbert v. Shanley*, 242 U. S. 591, apply to the performances of copyrighted non-dramatic musical works on sustaining radio programs by philanthropic and educational organizations which are not operated for profit?

2. Does the non-commercial broadcast to the public of a portion of a non-dramatic musical composition as part of a major educational program in the course of the philanthropic and educational activities of a non-profit radio station constitute an infringement of copyright because the non-profit organization incidentally derived revenue for its operations from a limited use of other periods of broadcast time for totally different and distinct programs in which the copyrighted work was not performed?

3. Does the performance of a portion of a non-dramatic musical work broadcast to the public as part of a major educational program by a non-profit, philanthropic and educational radio station constitute a public performance "for profit"?

Specification of Errors

1. The Circuit Court erroneously affirmed summary judgment entered against petitioners for copyright infringement.

2. The Circuit Court erroneously interpreted the Copyright Act so as to afford plaintiff protection in a situation not permitted by said statute.

3. The Circuit Court erroneously construed the decision of this Court in *Herbert v. Shanley, supra*, to hold a philan-

thropic and educational organization which does not operate for profit liable for infringement of copyright of a non-dramatic musical work by reason of the broadcast of a portion thereof on a non-commercial sustaining program presented as a public service.

Reasons Relied on for Allowance of Writ

1. Congress did not intend that a charitable or educational organization should be held accountable for the performance of a copyrighted composition where such performance was not for profit but was in the pursuance of the charitable, cultural and educational purposes of such performer.

2. This Court did not intend its decision in *Herbert v. Shanley, supra*, to apply to the performance of a copyrighted composition by a non-profit organization where such performance was not made in connection with a business which is operated for profit.

3. The test applicable to the performance of a copyrighted non-dramatic musical work for profit is whether the performer is engaged in a business operated for profit. No question is raised herein as to the standard laid down in *Herbert v. Shanley* that no immediate profit need be derived from the particular performance so long as it is connected with the ultimate object of the performer to derive profit in the course of the conduct of a business. The instant action, however, does present totally different facts and circumstances from *Herbert v. Shanley* and requires the adoption of a completely different standard so as to exempt performers of non-dramatic musical works from liability for copyright infringement who perform such works solely for philanthropic and educational purposes. If the principle established herein by the Circuit Court of Appeals is allowed to remain as authority, then all charitable and

non-profit organizations which perform copyrighted musical works in connection with activities in the public welfare would be liable for copyright infringement merely because they derive some revenue to defray the cost of achieving their philanthropic and educational purposes. The principle established by the Circuit Court of Appeals may well extend to charging such non-profit organizations with new liabilities in other aspects of their operations unconnected with the performances of copyrighted musical works. The premise of the Circuit Court's decision is fundamentally unsound and the decision itself is illogical, illegal and untenable.

WHEREFORE, your petitioners pray that a writ of certiorari be issued under the seal of this Court directed to the Circuit Court of Appeals for the Second Circuit commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals had in the case numbered and entitled on its docket No. 149, October Term, 1943, "Associated Music Publishers, Inc., Plaintiff-Appellee, against Debs Memorial Radio Fund Inc., et al., Defendants-Appellants", to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment herein of said Circuit Court be reversed by this Court; and for such other and further relief as to this Court may seem proper.

Dated : September 11th, 1944.

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